

### **REMARKS**

Entry of the Amendment, reexamination and further and favorable reconsideration of the subject application in light of the following remarks, pursuant to and consistent with 37 C.F.R. § 1.111, are thus respectfully requested.

#### **1. Status of the Claims**

Claims 1-24 are pending. Claims 1-24 stand rejected. After entry of the above amendments, claims 1-9, 12-13, and 16-28 stand pending with claims 25-28 being new, and claims 4, 12, 13, and 16-22 having been amended. Claims 10, 11, 14 and 15 stand cancelled. Applicants have submitted amendments without prejudice to or disclaimer of the cancelled subject matter. Applicants reserve the right to file a divisional or continuation application on any subject matter canceled by way of amendment.

Claims 16-22 have been amended to no longer recite canceled claim 10. The value of 0.6% can be found for example on page 14, line 19. Thus, the amendments to the claims are supported at least by the original claims and indicated page.

#### **2. Certified Priority Documents**

Applicants note the indication that all certified priority documents have been received in this application.

#### **3. Information Disclosure Statements**

Applicants note with appreciation the acknowledgement of the Information Disclosure Statements filed April 11, 2005; August 10, 2006; and December 11, 2007.

#### **4. Objection to the Claims**

Claims 4, and 10-13 are objected to as being drawn to compounds in the context of a product-by-process claim format.

Applicants traverse the objection as it applies to amended claim 4. Claim 4 as amended more clearly sets forth that the claim is a process claim, and not a product-by-process claim.

Applicants further traverse the objection as it is applied to claims 10-13. Claims 10-13 are product by process claims. Applicants have amended the claims to more clearly reflect that nature. Applicants point out that product-by-process claims constitute a proper method of claiming the invention. *See e.g.*, M.P.E.P. § 2173.05(p) ("A product-by-process claim, which is a product claim that defines the claimed product in terms of the process by which it is made, is proper."). Regarding claims 10-13, these are not compound claims but rather composition claims resulting from a process. Claims 10-13 have also been amended to more clearly recite a product-by-process.

The objection in view of the amendments to the claims and the above argumentation is thus mooted and can be withdrawn.

**5. Rejection of the Claims Under 35 U.S.C. § 102(b)**

Claims 1-24 stand rejected under 35 U.S.C. § 102(b) allegedly as being anticipated by EP Patent No. 957,173 [hereinafter "EP '173"] or Higashiyama et al. (U.S. Pat. No. 6,117,905) [hereinafter "the '905 patent"], or Kawashima et al. (U.S. Pat. No. 6,280,982) [hereinafter "the '982 patent"], or Kawashima et al. (U.S. Pat. No. 5,322,780) [hereinafter "the '780 patent"]. The Office alleges that all 4 references teach the production of "a microbial fat or oil having lowered unsaponifiable matter content and increased unsaturated fatty acid content with the nitrogen source content typically range 0.01 to 5%." The Office further asserts that allegedly "the parameters in the dependent claims are also taught in the references as shown in pages 2&3 of EP '173, cols. 2-5 of US '905, cols 3-4 of US'982, and cols 2-4 in US'780."

Applicants traverse the rejection to the extent it applies to the claims as amended. The rejection as it pertains to claims 10-11 and 14-15 stand mooted. "Anticipation requires the presence in a single prior art disclosure of all elements of a claimed invention arranged as in the claims". Jamesbury Corp. v. Litton Industrial Products, Inc., 225 U.S.P.Q. 253, 256 (Fed. Cir. 1985) and M.P.E.P. § 2131. Applicants point out that the Office has failed to provide a claim by claim analysis of where each of the stated references allegedly anticipate each element of each claim. This analysis is required pursuant to M.P.E.P. § 707.07(d) [A plurality of claims should never be grouped together in a common rejection, unless that rejection is equally applicable to all

claims in the group.]. The Office failed to provide the analysis with regard to any claim, but just made conclusory arguments regarding anticipation. Thus, Applicants assert that a *prima facie* case of nonobviousness has not been adduced, and the rejection should be withdrawn.

Regarding EP Patent No. 957,173, this reference does not teach or suggest amounts of ester type sterols. Additionally, the reference cannot teach or suggest as a consequence a decrease in ester type sterols.

Regarding Higashiyama (U.S. Pat. No. 6,117,905), the reference at least does not describe a decrease of ester type sterols.

Regarding Kawashima et al. (U.S. Pat. No. 6,280,982), the reference does not teach or suggest any ester-type steroid content. The '982 patent also does not teach or suggest any unsaponifiable matter.

Regarding Kawashima et al. (U.S. Pat. No. 5,322,780), the '780 patent does not teach or suggest an ester-type steroid content and amounts of unsaponifiable matter.

Applicants note that claims 1-9 and 23 are process claims. Claims 2-9 and 23 all depend directly or indirectly from claim 1. None of the four references teach or suggest using a culture tank equipped with an agitation impeller satisfying the requirement that the ratio of the diameter of agitation impeller ( $=d$ ) to the inner diameter of the culture tank ( $=D$ ) is  $d/D = 0.30$  to  $0.6$  (recited in claim 1). Therefore, claims 2-9 are likewise not anticipated by the references as they incorporate all the limitations of claim 1.

Remaining 18-22 and 24 recite a product containing unsaponifiable matter content that is not more than 2.2% by weight. In fact, the claims recited not more than 0.6% by weight. Neither the '780 patent nor the '982 patent teaches or suggests the content range of the unsaponifiable matter or ester-type sterol present in the oil or fat product. The '780 and '982 patents also do not teach an ester-type sterol %, the limitation relating to 24,25-methylenecholest-5-en-3-ol %, refining the fat/oil, more than 70% triglyceride, or the use of the oil in a food composition or in a pharmaceutical composition. Thus, the Office's statement that all 4 references teach all the elements of the claims is incorrect. Applicants further note that none of the four references teach or suggest the use of the oil or fat in the form of a pharmaceutical composition as claimed in claims 21-22.

For all the reasons stated above, Applicants submit the reference do not teach or suggest claims 1-9, 12, 13, 16-24 and new claim claims 25-28. Accordingly, the rejection should be withdrawn and the claims allowed.

### CONCLUSION

In conclusion, this is believed to be in full response to the outstanding restriction requirement. Should any issues remain outstanding or if there are any questions concerning this paper, or the application in general, the Examiner is invited to telephone the undersigned representative at the Examiner's earliest convenience. Should any outstanding fees be owed or overpayments credited, the Commissioner is invited to charge or credit Deposit Account No. 50-0573.

Respectfully submitted,  
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